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No. 88-1958

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

SUPREME BEEF PROCESSORS, INC.
v.
ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICI CURIAE

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MOTION FOR LEAVE TO FILE JOINT BRIEF AS AMICI CURIAE

Joint Movants, The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc., and Health and Personal Care Distribution Conference, Inc.(herein referred to as "Shipper Associations"), pursuant to Rule 36.1 of the Rules of this Court, hereby move for leave to file a brief as *amici curiae* in support of petitioner herein on the issue of whether the primary jurisdiction doctrine required that the courts below refer to the Interstate Commerce Commission ("ICC" or "Commission") for determination the question of whether a motor common carrier's practices were reasonable under the Interstate Commerce Act. In support of their motion, the Shipper Associations state as follows:

1. The undersigned counsel have not been able to obtain consent from respondent's counsel for the filing of the attached brief as *amici curiae*.

2. The membership of the The National Industrial Transportation League ("League") is comprised of approximately 1300 shippers and groups and associations of shippers conducting industrial and/or commercial enterprises, large, medium and small, in all States of the Union. The members of the League are substantial users of transportation by motor common carrier. It is estimated that League members, directly or indirectly, are responsible for the routing of approximately 80% of the nation's freight and the League is the only nationwide organization representing shippers of all sizes and commodities utilizing all of the various modes of transportation in moving their goods in interstate and international commerce.

3. National Small Shipments Traffic Conference, Inc. is an association with approximately 275 shipper members throughout the United States. The Health and Personal Care Distribution Conference, Inc. has a membership of approximately 70 companies which manufacture and ship drugs, medicines and personal care items throughout the nation. The members of these Conferences ship primarily via motor common carriers.

4. The Shipper Associations, *inter alia*, participate actively before administrative, judicial

and legislative bodies to advance the interests of their shipper members. The League, with the support of the other Shipper Associations and the shipping community in general, petitioned the Interstate Commerce Commission to institute a proceeding. This led to the decision in Ex Parte No. MC-177, *The National Industrial Transportation League – Petition for Rulemaking – Negotiated Motor Common Carrier Rates,* 3 I.C.C.2d 99 (1986). In this proceeding, the Interstate Commerce Commission adopted a policy whereby it would consider, on a case-by-case basis, whether it would be an unreasonable practice in violation of the Interstate Commerce Act for a motor common carrier to collect an asserted undercharge claim where the claim arose due to the carrier's failure to publish tariffs reflecting rates which the carrier represented to the shipper were in fact legally effective rates.

5. The decision of the Shipper Association's to pursue the relief reflected in the Ex Parte No. MC-177 policy statement was prompted by a groundswell among their members who were receiving proliferating "balance due" claims from the collection agents of numerous bankrupt motor carriers, or their assigns, asserting that rates originally assessed and timely paid were not reflected in published tariffs on file with the I.C.C. The members of the Shipper Associations in particular, and the shipping public in general, were outraged that the collection agents of a defunct carrier could demand monies *in addition* to the rates which the carrier represented were effective tariff

rates years after the transportation had been provided.

6. Because the Commission's policy statement was rendered in response to the League's petition for rulemaking, as supported by the other Shipper Associations, and in light of the substantial interests of the members of the Shipping Associations in establishing the obligation of the courts to apply the primary jurisdiction doctrine in the context of the Commission's policy statement, the Shipper Associations submit that there is compelling justification for this Court to grant their motion for leave to file their joint brief as *amici curiae* in support of the petition. The Shipper Associations so pray.

Respectfully submitted,

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JOINT BRIEF FOR AMICI CURIAE

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QUESTION PRESENTED

Whether the primary jurisdiction doctrine required the referral by the courts below to the Interstate Commerce Commission of an issue involving the reasonableness of a motor carrier practice under the Interstate Commerce Act.

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BRIEF FOR AMICI CURIAE

The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc., as *amici curiae,* respectfully urge this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed a refusal by the lower courts to refer to the Interstate Commerce Commission the question of the reasonableness of the collection of additional freight charges on behalf of a motor carrier of property subject to the Interstate Commerce Act.

REASONS FOR GRANTING THE WRIT

This case presents an important question involving the proper administration of the Interstate Commerce Act. The decision of the court of appeals is in direct conflict with controlling decisions of this Court and with decisions involving a similar issue in other courts of appeals. Its refusal to refer an issue of unreasonableness under the doctrine of primary jurisdiction was contrary to well-established and important principles of law. Review by this Court would materially assist in the resolution of conflicts involving the same issue among the lower federal courts and state courts in a large number of cases already pending and others that may be commenced in the future.

Under the Interstate Commerce Act, a motor common carrier of property has a statutory duty to establish reasonable rules and practices related to the transportation or service provided to its shippers. 49 U.S.C. §§10702(a)(2) and 10701(a). This Court has developed and applied the doctrine of primary jurisdiction in a long series of cases involving the Interstate Commerce Act and similar statutes. That doctrine allocates to the appropriate administrative agency (in this case, the ICC) the responsibility for uniformly applying the statutory duties expressed in general language in the statute to specific factual situations. *United States v. Western Pacific R. Co.*, 352 U.S. 59, 62-65 (1956). The doctrine was not followed by the courts below in this case.

The court of appeals refused to follow the primary jurisdiction doctrine and refer a reasonable practice question raised by the petitioner to the ICC because it incorrectly believed that the Act does not permit a shipper to avoid the payment of the applicable tariff charge when the motor carrier agreed to establish, but failed to publish in tariff form, another rate. The ICC, on the other hand, has followed, and has recently restated and clarified, a policy of exercising its primary jurisdiction to find, in appropriate factual circumstances, that such a course of conduct is an unreasonable practice. *The National Industrial Transportation League – Petition for Rulemaking – Negotiated Motor Common Carrier Rates,* 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989).[1]

The court of appeals incorrectly relied on this Court's decision in *Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94, 97 (1915). In that decision, this Court clearly articulated the classic statement that, on the one hand, a shipper was not permitted to deviate from a carrier's published tariff rate, but that, on the other hand, a shipper could still have the published rate set aside by invoking the reasonableness jurisdiction of the ICC. *Accord, Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 453 (1945), and *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.,* 284 U.S. 370, 384 (1932). But the

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[1] The clarifying decision, served on June 29, 1989, contains a comprehensive and clear exposition of the agency's views on the respective roles of the ICC and the courts in resolving these cases. 5 I.C.C. 2d at 624-31.

court of appeals, in citing the relevant passage from the *Maxwell* case, inexplicably omitted the crucial language in Justice Hughes' opinion[2] that explicitly stated that the ICC had the authority to find a published tariff rate to be unreasonable. *Compare* 237 U.S. at 97 *with* 864 F.2d at 390 (reprinted in petitioner's appendix, p. B-5).[3]

The court of appeals thus negated one of the most important means for the Commission to exercise its authority to enforce the duty of motor common carriers to establish reasonable rates and practices. Congress has authorized the agency *alone* to make findings that form the basis of an award of damages to injured shippers in the form of reparations for unreasonable rates or practices. 49

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2 Incorrectly attributed by the court of appeals to Justice Brandeis. Petitioner's appendix p. B-4. However, in another case, Justice Brandeis also clearly stated the ICC's authority to set aside or suspend a published tariff. *Keogh v. Chicago & N. W. Ry. Co.* 260 U.S. 156, 163 (1922).

3 The passage involved from *Maxwell*, at 237 U.S. 97, states:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.*

[emphasis added.] The italicized language, which was omitted by the court of appeals, is not mere surplusage, but is an important principle regarding the role of the ICC in exercising its statutory authority to enforce the duties imposed by the Act on carriers.

U.S.C. §11705(b)(3) and *Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*, 371 U.S. 84 (1962). Moreover, it is abundantly clear that only the *ICC* and not the courts may make a finding that a particular motor carrier practice is unreasonable, so as to preclude the collection of rates published in the otherwise applicable tariff. *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-80 (1966) and *Western Transportation v. Wilson & Co.*, 682 F.2d 1227, 1232 (7th Cir.1982).

The court of appeals, by refusing to refer the unreasonable practice defense raised by petitioner to the ICC, is not recognizing the right of shippers being sued by a carrier for undercharges to oppose the claim with a contention that it would be unreasonble under the Act to permit the collection of the otherwise applicable tariff charges. *United States v. Western Pacific R. Co., supra,* and *Seaboard System R. Co. v. United States,* 794 F.2d 635, 637-8 (11th Cir. 1986).[4]

By refusing to direct the referral to the ICC of the petitioner's claim that the collection of additional freight charges in the particular circumstances involved would be an unreasonable

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4 The court of appeals was plainly wrong in distinguishing this decision on the grounds that referral is only appropriate when the tariff at issue is ambiguous. Petitioner's appendix p. B-10-11. The Eleventh Circuit approved the ICC's finding that the tariff must be considered unambiguous, but nonetheless affirmed the ICC's finding that it would be an unreasonable practice to allow the carrier to collect the additional freight charges. 794 F.2d at 637-38.

practice, the court of appeals has violated the primary jurisdiction doctrine by securing for itself the exclusive power vested in the ICC to make that determination. *United States v. Western Pacific R. Co., supra,* 352 U.S. at 63-65 and *General American Tank Car Corp. v. El Dorado Term. Co.,* 308 U.S. 422, 432-33 (1940). The ICC *must* have the first opportunity to determine the reasonableness of the practices engaged in by the motor carrier.

This Court has regarded "the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation to be of continuing public concern." *United States v. Western Pacific R. Co., supra,* 352 U.S. at 63. As detailed in the petition,[5] a large number of cases involving identical issues, many with conflicting views on the application of the primary jurisdiction doctrine, are pending in the lower federal and state courts. In order to provide a clear direction as to the nature of that relationship for the benefit of all of those courts considering this and similar cases, review of the court of appeals decision in this case is essential.

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5 Petitioner's Appendices G and H

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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